Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MOHAMMAD TARIQ,

Petitioner,

v.

ALBERTO GONZALES,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Section 245(i) of the Immigration and Nationality Act ("INA"), INA §245(i), 8 U.S.C. 1255, provides for the adjustment of status of certain aliens physically present in the United States who are the beneficiaries of an application for a labor certification under section 212(a)(5)(A) of the INA that was filed pursuant to the regulations of the Secretary of Labor on or before April 30, 2001. However, delays within the U.S. Department of Labor have led to extraordinarily lengthy adjudication times for approval of timely-filed pending labor certifications. The question presented is whether the U.S. Fifth Circuit Court of Appeals interpretation of INA §245(i) with respect to pending labor certifications, which bars relief for aliens in proceedings with pending labor certifications, is proper, particularly in light of the fact that there is a split between the Circuits on this issue.

2. Whether an alien's due process rights to seek adjustment of status pursuant to section 245(i) of the INA are violated when said relief is denied solely because of the pendency of a labor certification.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Citations to the Opinions and Orders Below	1
Statement of Jurisdiction	1
Applicable Law	2
Statement of the Case	5
A. Jurisdiction of the Court of Appeals	6
B. Facts	6
C. Procedural History	7
1. Administrative Appeal	7
2. Judicial Review	8
Argument for Allowing the Writ	8
A. Adjustment of Status under Section 245(i) of the Act	11
B. Reopening and Adjournment during Pendency of Labor Certification	13
C. Violation of Due Process	15
D. The Circuit Split	16
Conclusion	19

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

INS v. Abudu, 485 U.S. 94 (1988) 7

Reno v. Flores, 507 U.S. 292 (1993) 15

UNITED STATES COURTS OF APPEALS

Ahmed v. Gonzales, 447 F.3d 433 (5th Cir. 2006) 8, 18

Animashaun v. INS, 990 F.2d 234 (5th Cir. 1993) 15

Calderon-Ontiveros v. INS, 809 F.2d 1050 (5th Cir. 1986) 15

Carbajal-Gonzalez v. INS, 78 F.3d 194 (5th Cir. 1996) 14

Diaz-Resendez v. INS, 960 F.2d 493 (5th Cir. 1992) 13, 14

Grass v. Gonzales, 418 F.3d 876 (8th Cir. 2005) 17

Howard v. INS, 930 F.2d 432 (5th Cir. 1991) 15

Merchant v. U.S. Attorney General, Nos. 05-13086 and 05-11949, 2006 LEXIS 21667 (11th Cir. August 25, 2006) 17

Ng v. INS, 804 F.2d 534 (9th Cir. 1986) 14

Ramachandani v. Gonzales, 434 F.3d 337 (5th Cir. 2005) 17, 18

Rivas-Martinez v. INS, 997 F.2d 1143 (5th Cir. 1993) 14

Subhan v. Ashcroft, 383 F.3d 591 (7th Cir. 2004) 7,8, 9, 12, 16

Zafar v. U.S. Attorney General, 426 F.3d 1330 (11th Cir. 2005) 17

TABLE OF AUTHORITIES – Continued

Page

STATUTES

8 U.S.C. §1182(a)(9)(B)(i)(II) 13
8 U.S.C. §1182(c) 4
8 U.S.C. §1252(a)(1) 6
8 U.S.C. §1252(a)(2)(B) 1
8 U.S.C. §1252(a)(2)(B)(ii) 12
8 U.S.C. §1252(a)(2)(D) 2
8 U.S.C. §1255 ..... *passim*
8 U.S.C. §1255(i) 11, 16
28 U.S.C. §1254(1) 1

REGULATIONS

8 C.F.R. §245.2(a)(1) 14
8 C.F.R. §245.10(a)(1)(i)(B) 11
8 C.F.R. §1003.2(c)(1) 3, 7
8 C.F.R. §1003.2(c)(2) 4
8 C.F.R. §1245.2(a)(1)(i) 3

CITATIONS TO THE C IONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Tariq v. Gonzales*, No. 05-60784 (5th Cir. October 12, 2006). App. 1.

The *per curiam* decision of the Board of Immigration Appeals denying Petitioner's Motion to Reopen his case to apply for adjustment of status to lawful permanent resident pursuant to section 245(i) of the Immigration and Nationality Act, 8 U.S.C. §1255, is unreported. *Matter of Tariq*, File A78-565-762 (BIA November 28, 2005). App. 4.

The *per curiam* decision of the Board of Immigration Appeals adopting and affirming the decision of the immigration judge and dismissing Petitioner's appeal from said decision is unreported. *Matter of Tariq*, File A78-565-762 (BIA July 14, 2005). App. 6.

The decision of the immigration judge denying Petitioner's application for relief is unreported. *Matter of Tariq*, File A78-565-762 (United States Immigration Court, Houston, Texas, April 12, 2004). App. 8.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on October 12, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves an application for relief from removal, review is not barred by 8 U.S.C. §1252(a)(2)(B) because the questions

presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §245(i), 8 U.S.C. §1255, which provides:

> Adjustment in status of certain aliens physically present in the United States. (1) Notwithstanding the provisions of subsections (a) and (c) of this section, an alien physically present in the United States – (A) who – (i) entered the United States without inspection; or (ii) is within one of the classes enumerated in subsection (c) of this section; (B) who is the beneficiary (including a spouse or child of the principal alien, if eligible to receive a visa under section 203(d)) of – (i) a petition for classification under section 204 that was filed with the Attorney General on or before April 30, 2001; or (ii) an application for a labor certification under section 212(a)(5)(A) that was filed pursuant to the regulations of the Secretary of Labor on or before such date; and (C) who, in the case of a beneficiary of a petition for classification, or an application for labor certification, described in subparagraph (B) that was filed after January 14, 1998, is physically present in the United States on the date of the enactment of the LIFE Act Amendments of 2000; may apply to the Attorney General for the adjustment of his or her status to that of an alien lawfully admitted for permanent residence. The Attorney General may accept such application only if the alien remits with such application a sum equaling $1,000 as of the date of receipt of the application, but such sum shall not be required from a child under the age of seventeen, or an alien who is the spouse or unmarried

> child of an individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986 at any date, who (i) as of May 5, 1988, was the unmarried child or spouse of the individual who obtained temporary or permanent resident status under section 210 or 245A of the Immigration and Nationality Act or section 202 of the Immigration Reform and Control Act of 1986; (ii) entered the United States before May 5, 1988, resided in the United States on May 5, 1988, and is not a lawful permanent resident; and (iii) applied for benefits under section 301(a) of the Immigration Act of 1990. The sum specified herein shall be in addition to the fee normally required for the processing of an application under this section. (2) Upon receipt of such an application and the sum hereby required, the Attorney General may adjust the status of the alien to that of an alien lawfully admitted for permanent residence if – (A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed.

8 C.F.R. §1245.2(a)(1)(i), which provides: "In General. In the case of any alien who has been placed in deportation proceedings or in removal proceedings (other than as an arriving alien), the immigration judge hearing the proceeding has exclusive jurisdiction to adjudicate any application for adjustment of status the alien may file."

8 C.F.R. §1003.2(c)(1), which provides:

> A motion to reopen proceedings shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by

affidavits or other evidentiary material. A motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation. A motion to reopen proceedings shall not be granted unless it appears to the Board that evidence sought to be offered is material and was not available and could not have been discovered or presented at the former hearing; nor shall any motion to reopen for the purpose of affording the alien an opportunity to apply for any form of discretionary relief be granted if it appears that the alien's right to apply for such relief was fully explained to him or her and an opportunity to apply therefore was afforded at the former hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing. Subject to the other requirements and restrictions of this section, and notwithstanding the provisions in §1001.1(p) of this chapter, a motion to reopen proceedings for consideration or further consideration of an application for relief under section 212(c) of the Act (8 U.S.C. §1182(c)) may be granted if the alien demonstrates that he or she was statutorily eligible for such relief prior to the entry of the administratively final order of deportation.

8 C.F.R. §1003.2(c)(2), which provides:

Except as provided in paragraph (c)(3) of this section, a party may file only one motion to reopen deportation or exclusion proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened, or on or before September 30, 1996, whichever is later. Except as provided in paragraph (c)(3)

> of this section, an alien may file only one motion to reopen removal proceedings (whether before the Board or the Immigration Judge) and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceeding sought to be reopened.

STATEMENT OF THE CASE

This case involves conflicting, irreconcilable interpretations of INA §245(i) between the Circuits. Specifically, the Seventh Circuit's interpretation permits an alien in removal proceedings to have proceedings either adjourned or continued while a pending labor certification filed pursuant to the provisions of INA §245(i), 8 U.S.C. §1255 is adjudicated, and, thereby, allows the alien to eventually apply for adjustment of status to become a U.S. lawful permanent resident if the labor certification is ultimately approved. However, the Fifth and Eleventh Circuit's interpretation does not permit a continuance or adjournment of removal proceedings during the pendency of a labor certification adjudication, and thus categorically bars an alien in these circuits from relief.

The dispute in this case is not over whether the Petitioner meets the eligibility requirements for adjustment of status to U.S. lawful permanent resident under INA §245(i), 8 U.S.C. §1255 once a labor certification is approved. Rather, the issue is whether relief for an alien in the form of adjustment of status under INA §245(i), 8 U.S.C. §1255 is available in court but for the length of time the Department of Labor has taken to adjudicate a timely-filed labor certification. As will be explained further herein, according to the interpretation of the Fifth and Eleventh Circuits, the intent of Congress in creating relief

for aliens under INA §245(i), 8 U.S.C. §1255 who had timely filed labor certifications would be entirely nullified based entirely on procedural delays out of the control of the alien in removal proceedings.

A. Jurisdiction of the Court of Appeals.

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts.

Petitioner Muhammad Tariq is a 57-year old married male native and citizen of Pakistan. He was admitted to the U.S. as a non-immigrant visitor on or about July 9, 1998, and he overstayed his authorized period of stay. The Petitioner's employer timely filed a labor certification on his behalf prior to April 30, 2001, and, to date, this labor certification remains pending. Petitioner has no criminal history.

Petitioner, as required by law, complied with the Special Registration procedures required of males from Pakistan, and, in doing so, was placed into removal proceedings. Again, Petitioner has no criminal history and was placed into removal proceedings solely based upon the visa overstay. At the time of his removal proceedings, the labor certification filed on his behalf was pending with the Department of Labor. However, as the labor certification had yet to be approved, the Petitioner sought relief before the immigration court in the form of asylum and withholding of removal.

C. Procedural History.

The immigration judge denied Petitioner's application for asylum and/or withholding of removal on April 12, 2004, and an order of removal was entered against Petitioner. App. 8. An appeal from the decision of the immigration judge was timely filed with the Board of Immigration Appeals ("BIA").

1. Administrative Review

The Petitioner's initial appeal of the denial of his asylum claim was dismissed by the Board of Immigration Appeals on July 14, 2005. App. 6. However, while this appeal was pending at the BIA, the U.S. Court of Appeals for the Seventh Circuit issued its decision in *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), in which it was held that an alien should be permitted a continuance or adjournment of proceedings while a labor certification is pending for purposes of INA §245(i), 8 U.S.C. §1255. Therefore, based upon *Subhan*, Petitioner timely filed a Motion to Reopen with the Board of Immigration Appeals asserting eligibility for relief as an alien with a pending labor certification under INA §245(i). App. 4.

The Board of Immigration Appeals denied Petitioner's Motion to Reopen and declined to apply *Subhan*'s rationale to cases arising from the U.S. Court of Appeals for the Fifth Circuit. App. 4. Further, the BIA, citing *INS v. Abudu*, 485 U.S. 94 (1988) and 8 C.F.R. §1003.2(c)(1), found that the Petitioner, absent an approved labor certification, had failed to establish *prima facie* eligibility for underlying relief in the form of adjustment of status. *Id.* The Petitioner timely filed a Petition for Review with U.S. Court of Appeals for the Fifth Circuit. App. 1.

2. Judicial Review

Before the U.S. Court of Appeals for the Fifth Circuit, Petitioner again urged that the decision by the BIA to not reopen Petitioner's proceedings in light of the *Subhan* decision violated both the language and intent of Congress in the creating INA §245(i), as well as Petitioner's due process and equal protection rights. App. 1. However, the Fifth Circuit found that the Board of Immigration Appeals did not abuse its discretion in denying the Petitioner's Motion to Reopen. *Id.* Further, the Fifth Circuit cited *Ahmed v. Gonzales*, 447 F.3d 433 (5th Cir. 2006) for the proposition that the filing of a labor certification does not vest an alien with any right to relief and is merely one step in the "long and discretionary process" of obtaining relief through adjustment of status under INA §245(i). *Id.* The Fifth Circuit, therefore, held that Petitioner failed to show any violation of due process rights since relief under INA §245(i) is discretionary. Thus, Petitioner's Petition for Review was denied on October 16, 2006. App. 1, 3. The instant Petition for Writ of Certiorari timely follows.

ARGUMENT FOR ALLOWING THE WRIT

The decision of the Fifth Circuit in this case is contrary to that of another circuit court and is ill-considered with respect to the issues raised. Therefore, this Court's intervention is necessary to ensure uniformity in the application of federal law.

The procedural circumstances presented by this case are not unusual. Specifically, an alien is fully eligible for relief from removal in the form of adjustment of status as statutorily mandated by Congress with the passage of INA

§245(i), but for procedural delays within the Department of Labor that are beyond the control of the alien. While the Fifth Circuit dismisses eligibility for INA §245(i) for aliens so situated by stating that the approval of a labor certification is simply the first in a long and discretionary process, and ignores the fact that following such a rationale would utterly nullify the intent of Congress in creating relief with INA §245(i). The rationale of the Seventh Circuit, as articulated by Judge Posner in the *Subhan* decision, is more thoroughly reasoned in light of Congressional intent, and is completely at odds with the Fifth Circuit's rationale.

Under the provisions of INA §245(i), an alien with a job offer and a labor certification filed on or before April 30, 2001 is eligible to adjust status to that of a U.S. lawful permanent resident. The rate-limiting step lies entirely with the U.S. Department of Labor's delays in processing these labor certifications. This has created the illogical and unnecessary situation wherein aliens in nearly identical situations are subject to entirely differing outcomes based merely on which U.S. Circuit Court of Appeals has jurisdiction over their cases once that alien is placed in removal proceedings.

This inequity was heightened with the special registration requirements passed in the National Security Entry-Exit Registration System ("NSEERS") program following the tragedy of September 11, 2001. This program required males of a certain age to register with the federal government, and, in doing so, numerous aliens who were merely doing their civic duty in complying with the registration requirements of NSEERS, and who had pending labor certifications, were placed into proceedings. On the other hand, aliens that chose not to comply with registration, were not placed into proceedings and upon ultimate

approval of their labor certification by the Department of Labor are able to adjust status. Alternatively, a law-abiding alien with a labor certification who complied with registration and was placed into removal proceedings and who is equally able to adjust status upon approval of the labor certification by the Department of Labor, is denied the opportunity to do so unless that alien is fortunate enough to reside in the jurisdiction of the Seventh Circuit. Such a denial of relief under INA §245(i) was not envisioned by Congress and such an arbitrary and inequitable application of this relief by the Fifth Circuit is unjustifiable, particularly when not accompanied by any reasoned analysis as to how such an interpretation can be even arguably consistent with the purpose and language of INA §245(i).

Thus, the implications of the Fifth Circuit's decision in this case extend far beyond the individual inequity suffered by Mr. Tariq. There are three primary reasons why the decision below should be vacated. First, eligibility for adjustment of status under INA §245(i) requires that a labor certification be filed prior to April 30, 2001. Removal of such aliens occurring while the labor certifications are pending is completely contrary to the language of the statute. Secondly, in failing to permit a continuance or adjournment during the pendency of an INA §245(i) grandfathered labor certification and in upholding such a failure, the Fifth Circuit affirmed denial of relief for grounds not articulated in the statute. Third, removal of aliens in such situations results in the abandonment of any pending applications for relief, thereby denying them of their Constitutionally protected right to due process of law. Finally, when these reasons are analyzed in light of the rationales espoused by the differing Circuit Courts of

Appeal, it becomes apparent that the differing interpretations of this issue are irreconcilable and require guidance from this Court.

A. Adjustment of Status under Section 245(i) of the Act.

Congress has explicitly provided that aliens certified to be entitled to be employed in the U.S. can adjust their status even if they are illegally present in the United States. *See* 8 C.F.R. §245.10(a)(1)(i)(B), 8 U.S.C. 1255(i). Furthermore, section 245(i) of the LIFE Act amended the Immigration and Nationality Act at 8 U.S.C. §1255(i) to allow the Attorney General, in his discretion and if certain conditions are met, to adjust the status of an alien who has an immigrant visa immediately available *or who has a labor certification pending*, to that of lawful permanent resident while the alien remains in the United States in lieu of applying for an immigrant visa at a U.S. consular office abroad. Moreover, the LIFE Act added a new sunset date of April 30, 2001 for the filing of qualifying petitions or applications (i.e., Form I-130s and U.S. Department of Labor applications for labor certification) that enable the applicant to apply for an adjustment of status under the provisions of section 245(i). Thus, in order to qualify to apply for adjustment of status under the provisions of the LIFE Act, the alien must be the beneficiary of an immigrant visa petition (Form I-130) or a labor certification application that is filed on or before April 30, 2001.

The Petitioner clearly falls within the purview of the LIFE Act and INA §245(i) as he has a pending labor certification timely-filed before the deadline. It simply is illogical for Congress to have specifically intended to

create relief for aliens with pending labor certifications but not permitted these same aliens to remain in the U.S. during the pendency of these applications. There is no point for creating relief under INA §245(i) if aliens can be removed during the pendency of their labor certifications because this effectively forces such aliens to abandon any hope of adjustment of status.

The inconsistency of such an interpretation was addressed by the Seventh Circuit in *Subhan*, *infra*, as follows:

> Supposing, therefore, though without having to decide, that section 1252(a)(2)(B)(ii) generally bars judicial review of a continuance granted by an immigration judge in a removal proceeding, we nevertheless think it unlikely that Congress, intending, as it clearly did, to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from the state and federal labor departments, at the same time also intended section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the statute. If that section is applicable to cases such as this – cases, that is, in which rulings on requests for adjustment of status are precluded by procedural rulings – immigration judges can with impunity refuse to grant one-week continuances to persons in Subhan's position. And that would sound the death knell for the request, since unlike most grounds for adjustment of status, adjustments based on employment, like those based on marriage to a U.S. citizen, cannot be pursued once the alien has been removed from the United States.

Subhan, *infra*, at 594 (internal citations omitted). It is anomalous for Congress to have intended to create a form

of relief specifically based on *pending* labor certifications, yet have availability for such relief interpreted to only exist once that labor certification is actually approved. Clearly, such an outcome is both unintended and unreasonable.

In the instant case, the Petitioner has been waiting over five years to complete his adjustment of status, for which he is eligible under INA §245(i), due entirely to delays by the Department of Labor. If he were to depart at this time, he would both abandon such an application for relief and he would be barred from returning legally to the United States for a minimum of ten years by statute. INA §212(a)(9)(B)(i)(II), 8 U.S.C. §1182(a)(9)(B)(i)(II). Therefore, if Petitioner is ever to become a lawful permanent resident, he must do so through adjustment of status *within* the United States as provided for by INA §245(i).

The Petitioner is entitled to adjust his status under the provisions of INA §245(i) as an alien with a job offer and a labor certification filed before April 30, 2001. The requirement that the labor certification be approved, as opposed to pending, in order to become eligible for such relief is *ultra vires* to the statute.

B. Reopening and Adjournment during Pendency of Labor Certification.

The failure of the BIA and the Fifth Circuit to permit either a continuance or an adjournment of proceedings while the Petitioner's labor certification remains pending was an abuse of discretion. An abuse of discretion occurs when the BIA acts arbitrarily, contrary to law, without rational explanation or inexplicably departs from established policies. *See Diaz-Resendez v. INS*, 960 F.2d 493,

495 (5th Cir. 1992) (holding that a decision by the BIA may be found arbitrary if the BIA fails to address meaningfully all material factors); *Ng v. INS*, 804 F.2d 534, 538 (9th Cir. 1986) (holding that BIA is required to "show proper consideration of all factors when weighing equities and denying ... relief."). Further, the Fifth Circuit has not previously hesitated to reject the Board's factual conclusions if those conclusions were reached by applying the wrong standards or legal analysis. *Rivas-Martinez v. INS*, 997 F.2d 1143 (5th Cir. 1993); *Carbajal-Gonzalez v. INS*, 78 F.3d 194 (5th Cir. 1996).

In this case, both the BIA and the Fifth Circuit erred as a matter of law in holding that the Petitioner case did not submit any evidence with his motion to reopen that he was the beneficiary of an approved labor certification as the statute imposes no such requirement that a labor certification be approved. Evidence was submitted that the Petitioner is the beneficiary of a pending labor certification. Immigration judges generally have jurisdiction to consider adjustment of status applications, and once presented with an application for adjustment of status, the immigration judge can inquire further into the status of an application for labor certification and Petitioner's eligibility for the relief sought. However, neither the BIA nor the Fifth Circuit can adjudicate an adjustment of status application. Therefore, this case should have been reopened and remanded to the immigration judge for consideration of Petitioner's adjustment of status. At that point, the immigration judge could make a determination of eligibility for relief, and could either continue the case or deny such a continuance if one is not justified. 8 C.F.R. §245.2(a)(1).

However, in the instant case, once proof of a pending labor certification was submitted with the Motion to Reopen, the BIA chose not to remand the case to the immigration judge for such a determination, and, despite having no jurisdiction to consider an application for adjustment of status not considered below, decided that the Petitioner was not eligible for adjustment because he was not the beneficiary of an approved labor certification. Again, Petitioner had filed proof of a labor certification filed prior to April 30, 2001, thereby showing at least *prima facie* eligibility for a determination as to eligibility for adjustment of status under INA §245(i). Without a reasoned analysis or at least a discussion of their ability to consider such an application for adjustment and make a finding of eligibility pursuant to and consistent with INA §245(i), the BIA should have remanded the case for such a finding.

C. Violation of Due Process.

It has been clearly established that, based upon the Fifth Amendment, that aliens are entitled to due process of law in deportation proceedings. *Animashaun v. INS*, 990 F.2d 234, 238 (5th Cir. 1993), *citing Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 1449, 123 L. Ed. 2d 1 (1993). However, due process challenges to deportation proceedings require an initial showing of substantial prejudice. *Howard v. INS*, 930 F.2d 432, 436 (5th Cir. 1991); *Calderon-Ontiveros v. INS*, 809 F.2d 1050, 1052 (5th Cir. 1986).

In the instant case, the Petitioner would suffer substantial prejudice if denied the opportunity for consideration of his application for adjustment of status. Specifically, if the case is not remanded for consideration,

Petitioner's application will be deemed abandoned and he will be barred from re-entry legally for a period of ten years. Such a potential outcome clearly creates substantial prejudice, and it is submitted to this Court that Petitioner has a due process right to pursue relief from removal in the instant scenario.

The holding of the Fifth Circuit in this case determined that relief in the form of adjustment of status is discretionary, and therefore no violation of due process has occurred. App. 3. However, the Petitioner contends that relief in the form of adjustment of status is not purely discretionary and is also subject to findings of statutory eligibility. The discretionary aspect of such relief is not reached until, at minimum, a non-discretionary legal eligibility determination has been made. Congress explicitly provided relief for aliens certified to be entitled to be employed in the U.S. through adjustment of status even if they are illegally present in the U.S. *See* 8 C.F.R. §245.10(a)(1)(i)(B), 8 U.S.C. 1255(i). Congress mandated a statutory entitlement when it created relief through INA §245(i), and, as such, created non-discretionary grounds that are subject to due process protection. Thus, Petitioner would suffer substantial prejudice if due process of law was not permitted to run its course in the instant case.

D. The Circuit Split.

The issue of whether an alien is entitled to remain in the United States during the pendency of a labor certification application timely-filed pursuant to INA §245(i) was first addressed in the Seventh Circuit in the case of *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004). In that case, Judge Posner delivered a nuanced opinion for the

Seventh Circuit in which it was found that, absent proof that an alien has delayed approval of his labor certification, a continuance during removal proceedings is required to permit the adjudication of an INA §245(i) grandfathered labor certification, and, as stated above, failure to do so would entirely frustrate Congressional intent in creating relief for individuals with pending labor certifications.

This issue has been indirectly addressed by multiple other circuits from the standpoint of whether a denial of a continuance request for a pending labor certification was an abuse of discretion, as opposed to whether such an action would be contrary to Congressional intent in creating relief under INA §245(i). *See, e.g., Zafar v. U.S. Attorney General*, 426 F.3d 1330 (11th Cir. 2005); *Grass v. Gonzales*, 418 F.3d 876, 877-89 (8th Cir. 2005).[1] The Fifth Circuit, from which the instant case arises, has published two opinions that are arguably contradictory. The first of these opinions was *Ramachandani v. Gonzales*, 434 F.3d 337 (5th Cir. 2005), wherein the Fifth Circuit upheld the denial of a continuance based upon a pending labor certification. However, it must be noted that the Fifth Circuit distinguished *Subhan* in *Ramachandani* when it noted that *Ramachandani* had failed to show that the application for labor certification had been filed prior to the April

[1] It should be noted that the Eleventh Circuit recently clarified its holding in *Zafar* in an unpublished decision, *Merchant v. U.S. Attorney General*, Nos. 05-13086 and 05-11949, 2006 LEXIS 21667 (11th Cir. August 25, 2006), stating that a denial of a continuance was an abuse of discretion when a labor certification had already been approved. Petitioner contends that the distinction as to whether the labor certification has been approved, while important, is irrelevant as to statutory eligibility for adjustment under INA §245(i).

30, 2001 deadline. *Ramachandani*, 434 F.3d at 338-40. In light of this failure, the Fifth Circuit determined that the immigration judge had not abused his discretion in denying a continuance, leaving open the possibility that such a denial may have been an abuse of discretion if evidence of such a timely-filed labor certification had been submitted.

The issue was again addressed by the Fifth Circuit in *Ahmed v. Gonzalez*, 447 F.3d 433 (5th Cir. 2006), wherein the Fifth Circuit found that the BIA did not abuse their discretion in refusing to reopen a case when the labor certification was not yet approved. The rationale was that, while a pending labor certification may be sufficient to establish statutory eligibility for adjustment under INA §245(i), an approved labor certification and an immediately available visa number is necessary to show *prima facie* eligibility for adjustment of status. When analyzed with the Congressional intent in the passage of INA §245(i) in mind, this conclusion is unjustifiable.

Specifically, under the Fifth Circuit's interpretation, all aliens with pending labor certifications would be categorically barred from applying for adjustment of status under INA §245(i) if said labor certifications are not approved at the time they are placed into removal proceedings. This interpretation completely ignores the intent of Congress in creating such relief. Petitioner maintains that Congress would not have created relief specifically for individuals with pending labor certifications with the intent that no such alien could take advantage of the very same provision. The Seventh Circuit's analysis of congressional intent properly led them to the conclusion that a continuance for a pending labor certification is the only conclusion consistent with the statute. However, the Fifth Circuit's interpretation in *Ahmed* re-affirms the irreconcilable

split existing between the Circuits on the issue of eligibility for adjustment of status under INA §245(i) while a labor certification is pending. The sheer inequity and unjust nature of interpreting the statute to create relief not available to those for whom that relief was created is unsustainable.

Therefore, as the Petitioner believes that the Seventh Circuit has correctly decided this issue and its interpretation is entirely at odds with the Fifth Circuit, Petitioner prays that this Court will intervene and provide guidance on this issue.

CONCLUSION

For the reasons shown, Petitioner urges that he is legally eligible for adjustment of status to lawful permanent resident notwithstanding the pendency of his labor certification application, and prays that this petition for writ of certiorari be granted.

Respectfully submitted,

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2006 WL 2929967

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-60784
Summary Calendar

MUHAMMAD TARIQ,

Petitioner,

versus

ALBERTO R. GONZALES,
U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals
BIA No. A78 565 762

(Filed October 13, 2006)

Before DeMOSS, STEWART, and PRADO, Circuit Judges.

PER CURIAM:*

Muhammad Tariq petitions for review of an order of the Board of Immigration Appeals (BIA) denying his motion to reopen. Tariq has abandoned the petition for

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

review from the BIA's dismissal of his appeal from the denial of his application for asylum and withholding of removal.

Tariq contends that the BIA erred by requiring him to support his motion to reopen with evidence that his application for labor certification had been approved. He asserts that this amounted to an improper adjudication of the adjustment of status issue by the BIA and that the BIA's failure to reopen the proceedings and remand the matter to the immigration judge deprived Tariq of his due process right to seek an adjustment of status.

The denial of a motion to reopen is reviewed for abuse of discretion. *De Morales v. INS*, 116 F.3d 145, 147 (5th Cir. 1997). A successful motion to reopen must establish a prima facie case of eligibility for the underlying relief sought. *See INS v. Abudu*, 485 U.S. 94, 104 (1988).

Pursuant to 8 U.S.C. § 1255(i), an alien physically present in the United States may apply for an adjustment of status to become a permanent resident if he is a beneficiary of an application for a labor certification that was filed before April 30, 2001. The Attorney General may adjust the status of an alien who has received a labor certification if "(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed." § 1255(i)(2). The filing of a labor certification does not vest an alien with any right to relief from removal but is merely one step in the "long and discretionary process" of obtaining an adjustment of status under § 1255(i). *Ahmed v. Gonzales*, 447 F.3d 433 438-39 (5th Cir. 2006).

The BIA did not abuse its discretion in determining that Tariq had not met his burden to make a prima facie showing that he was eligible for relief under § 1255(i). Because such relief is discretionary, Tariq also has failed to show any due process violation. *See Ahmed*, 447 F.3d at 440.

The petition for review is DENIED.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-565-762 – Houston Date: NOV 28 2005

In re: TARIQ, MUHAMMAD

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Gonzales, Raed

ON BEHALF OF DHS: Charlotte K. Lang, Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent moves the Board pursuant to 8 C.F.R. § 1003.2 to reopen our decision dated July 14, 2005. A motion to reopen for the purpose of submitting an application for relief must be accompanied by the appropriate application and by all the supporting documentation. 8 C.F.R. § 1003.2(c)(1). The respondent has not submitted any evidence with the current motion showing that he is the beneficiary of an approved labor certification. We find the respondent's reliance on *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), misplaced inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, and not the Seventh Circuit where the cited case arises. The cited case is thus not binding as precedent. In the absence of an approved labor certification, the respondent is unable to establish prima facie eligibility for the underlying relief sought so as to warrant reopening. *See INS v.*

Abudu, 485 U.S. 94 (1988); 8 C.F.R. § 1003.2(c)(1). Accordingly, the motion is denied.

/s/ [Illegible]
FOR THE BOARD

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A78-565-762 – Houston Date: JUL 14 2005

In re: TARIQ, MUHAMMAD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Raed Gonzales, Esquire

ON BEHALF OF DHS: Charlotte K. Lang
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227(a)(1)(B] – In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

ORDER:

PER CURIAM. We adopt and affirm the April 12, 2004, decision of the Immigration Judge to the extent he denied the respondent's claim for asylum on the basis of his failure to provide clear and convincing evidence that his application for asylum was timely filed and that he failed to establish that he was eligible for one of the enumerated exceptions to the time bar. We further adopt and affirm the Immigration Judge's decision in which he denied the respondent's application for withholding of removal under section 241(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1231(b)(3). *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) (noting that

adoption or affirmance of a decision of an Immigration Judge, in whole or in part, is "simply a statement that the Board's conclusions upon review of the record coincide with those which the Immigration Judge articulated in his or her decision"). We agree that the respondent has failed to carry his burden of proof with respect to establish that it would be more likely than not that he would be persecuted on account of a protected ground or that he will be tortured upon return to Pakistan.

Accordingly, in view of the above, the appeal is dismissed.

/s/ Frederick D. Hess
FOR THE BOARD

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Houston, Texas

File A 78 565 762 April 12, 2004

In the Matter of

MUHAMMAD TARIQ,) IN REMOVAL PROCEEDINGS
)
Respondent)

CHARGE: Section 237(a)(1)(B) of the Immigration and Nationality Act – remained longer than permitted.

APPLICATIONS: Withholding of removal pursuant to Section 241(b)(3)(A).

ON BEHALF OF RESPONDENT:
Imran Mirza, Esquire
5177 Richmond Avenue
Suite 800
Houston, Texas 77056

ON BEHALF OF DEPARTMENT OF HOMELAND SECURITY:
Charlotte Lang, Esquire
Assistant Chief Counsel

ORAL DECISION AND ORDER
OF THE IMMIGRATION JUDGE

The respondent's a 57-year-old married male, native and citizen of Pakistan who was admitted to the United States on or about July 9, 1998 as a non-immigrant visitor with authorization to remain for a six-month period. On March 19th of 2003 Immigration and Naturalization Service issued a Notice to Appear charging the respondent with removability pursuant to the above-captioned provisions of the Act.

The respondent appeared with counsel before the Immigration Judge and denied allegations 2 and 3, and

denied removability. The Department of Homeland Security then issued and served on the respondent additional charges of removability pursuant to an I-261 contained in the record at Exhibit 2. And the respondent denied those allegations as well. However, the Court found, based upon the evidence presented by the Government, including the I-213 contained in the record at Exhibit 3, the I-94 contained in the record at Exhibit 5, and the copy of the respondent's passport contained in the record at Exhibit 4, the allegations to be true and found that the charge was sustained. The respondent then applied for relief from removal in the form of withholding pursuant to Section 241(b)(3)(A). The respondent does not claim that there are any extraordinary or changed circumstances which would excuse his failure to file within one year, and he therefore does not seek asylum, and he is not seeking any other relief under the Act.

The respondent testified that he's 57 years old, that he is married to a lady named Rabina, who is in the United States illegally. He entered the United States in 1998 as a visitor. He fears to return to Pakistan because of the People's Party. He belonged to the Muslim League, and he joined that organization in Pakistan in March of 1991. No other members of his family are members of the Muslim League; however, they do support the Muslim League. The respondent stated that the individuals that he worked for always got elected. He would go door to door and canvass for his candidates and he would make political speeches at political meetings.

The respondent was attached [sic] in 1993 after his candidate won the election. He stated that it was usually three to five members of the Muslim League who conducted such attacks. They threatened him and then they beat him.

They told him that he was a very effective campaigner and that he convinced members of their party to change their votes. Respondent stated he did not have to go the hospital but the beating lasted for 30 minutes.

The respondent was attacked again in 1997. On that occasion his whole party won, not just his candidate. And again the beating occurred outside of his house. Again it was also members of the Pakistan People's Party who attacked him on this occasion. He stated that it was either five to seven members who attacked him. They told the respondent that he must stop being active in campaigns.

The respondent testified that the Pakistan People's Party goons are very clever in that they beat their victims in such a way so as not to show that they have been attacked. On this occasion in 1997 when he was again attacked, he stated that he did not have to go to the hospital and again treated himself at home for his injuries.

The respondent was arrested in 1997 during the campaign. On that occasion the Pakistan People's Party bribed the police and got the respondent arrested. He was detained for one hour.

The respondent stated that his youngest son, Farhan, was beaten by the Pakistan People's Party in March of 1999. He was on his way to school. On that occasion he was admitted to the hospital. He stated that his son is now in Canada and went to Canada after he learned that he would be required to register with the Department of Homeland Security. He stated that his son's beating in 1999 took place after he arrived in the United States, but that his family had informed him of what happened.

The respondent's son was also beaten on October 17th of 1999, and this time he and his son had to remain in the hospital for two days.

The respondent lived in Lahore when he was in Pakistan. He stated that he could not relocate for two reasons. First, there is a language problem, he speaks Urdu and Punjabi and the language in, for example, Karachi, is Sindhi. And secondly, the Pakistan People's Party are everywhere. He was a Yamaha dealer in Pakistan. That business is no longer in operation because Yamaha declined to continue to provide products after the respondent left and was no longer able to run the business. He had left the business to other relatives who did not successfully operate that business.

The respondent stated that his son left Pakistan in October of 1999 and came to the United States via England. He then went to Canada when he found out that he was required to register in the United States. The only reason the respondent applied for withholding of removal in the United States is because he had been placed in removal proceedings. He stated that his wife is home today, that she did not come to testify for him because she is too fearful.

Respondent has not satisfied the requirement of showing by clear and convincing evidence that he applied for asylum within one year of his last arrival in the United States. 8 C.F.R. Section 208.4(a)(2). Respondent is therefore not eligible for asylum because he has not established any extraordinary circumstances or changed circumstances which materially affected his eligibility for asylum and he does not claim that any such changes exist.

The respondent bears the evidentiary burdens of proof and persuasion in his application for withholding of removal. *Matter of Acosta,* 19 I&N Dec. 211 (BIA 1985). To establish eligibility the respondent must demonstrate a clear probability of persecution in the country designated for removal on account of race, religion, nationality, membership in a particular social group or political opinion. *INS v. Stevic,* 467 U.S. 407 (1984). This means the respondent's facts must establish that it's more likely than not that he would be subject to persecution for one of the grounds specified in the Act.

Respondent's credibility is of extreme importance in assessing the claim. In determining the credibility of the respondent's testimony, I've taken into account not only his demeanor while testifying but also the rationality, internal consistency and inherent persuasiveness of his testimony. I have also considered the respondent's documents or lack thereof that he has submitted in support of his application and the fact that the respondent did not present witnesses which should have been available. For example, the respondent's stated that his wife is in the United States and that she is here illegally. However, the respondent did not present his wife as a witness. The respondent did not provide a reasonable explanation why a witness who should be familiar with the respondent's situation in Pakistan was not presented to corroborate his testimony. His only explanation was that she was too fearful. The respondent also submitted documents in support of his application and those documents are suspect. The documents were not certified pursuant to 287.6, and they seem to have been created for a purpose other than the medical treatment they are purporting to represent. For example, the respondent's Exhibit 10, tab C

purports to be a medical report relating to the treatment of his son that occurred in October of 1999, and in that document the medical personnel wrote the patient was brought to the hospital emergency by his friend after violence of the opponents. It is unclear why the doctor or the medical person who drafted this document would include the statement violence of the opponents in the section particulars of injuries or symptoms in case of poisoning it seems that the document was created [sic] support the respondent's contention that his son suffered some kind of violence as a result of his political opinion. The document just simply does not appear to be authentic. And there are no other assurances of authenticity. It does have a stamp which says certified true copy, medical officer in Lahore. But it is an enormous photocopy and according to the respondent was sent to him from his son in Canada. It is unclear why his son would have to send him this document from Canada when his son had been in the United States up until the point where he left for Canada when he found that he would have to register here in the United States. In any event, no clear explanation was provided as to how the respondent or his son came into possession of this document. And it just simply does not appear to be reliable.

The respondent has not established that any treatment that he received in the past rises to the level of persecution. He did testify that on two occasions he was attacked by disgruntled members of the opposing party. But his testimony regarding those two events is extremely vague and in most respects unlikely. For example, the respondent stated when asked how many people attacked him in 1993 he replied it was usually three to five. It seems that the respondent would know how many people

attacked him in 1993, particularly when he stated that the beating he received lasted for 30 minutes. That seems extremely unlikely. If the respondent had been beaten continuously for 30 minutes, and it is hard to imagine a beating lasting that long, frankly, and the respondent would've suffered some kind of injuries, but the respondent stated that he did not receive any injuries and he treated himself, he didn't have to go to the hospital. In any event, he didn't provide very many details regarding that incident. He also testified about an attack that occurred in 1997. And once again his testimony was extremely vague. He did stated [sic] that it occurred outside of his house and the fact his whole party won after that particular election. But the respondent when asked how many people attacked him stated that it was either five or seven.

Again the respondent's testimony was inconsistent with his application when he testified that he was arrested in 1997. On that occasion the respondent testified that the Pakistan People's Party bribed police officers and got him arrested and he was detained for an hour. Not only is that not in his application and therefore inconsistent with his testimony, but the Court further finds that even if that were true, it would not rise to the level of persecution. First of all, there is no government action and there is no indication that the respondent's detention for a period of one hour rises to the level of persecution. And in fact, it clearly does not. It is also somewhat telling that the respondent when asked why he did not include his arrest in 1997 stated he didn't think it was so important and that he wasn't detained for a day, so he simply didn't write it down. Apparently the respondent did not put much emphasis on his arrest in 1997 when he filled out his application.

The respondent also stated that he did not apply for asylum in the United States when he first came here because he did not intend to. And in fact he stated that he would not have applied for asylum or withholding of removal in the United States had he not been placed in removal proceedings.

The respondent also provided some testimony regarding his inability to relocate within Pakistan. And his first reason was because he could not speak the language in other parts of Pakistan. He stated that he speaks Urdu and Punjabi and that in Karachi they speak Sindhi. But that does not seem like a reasonable explanation to support his contention that he could not relocate. His second reason was simply that the Pakistan People's Party are everywhere in the country.

In consideration of the foregoing, the Court finds that the respondent has not provided credible testimony in support of his application. Even if his testimony were taken as true, the Court does not find that the treatment that the respondent received in the past rises to the level of persecution. There is no government action, there is no reason why the respondent would not be able to relocate within Pakistan, and the proof that the respondent has provided does not demonstrate that it's more likely than not that he would be persecuted if he were to return to Pakistan. Therefore, his application for withholding must be denied.

ORDER

For all the foregoing reasons the following orders will be entered.

IT IS HEREBY ORDERED that the respondent's application for withholding of removal under Section 241(b)(3)(A) of the Act be denied.

IT IS FURTHER ORDERED that the respondent be removed from the United States to Pakistan on the charges contained in the Notice to Appear.

WARNING TO THE RESPONDENT. An order of removal has been entered against you. If you fail to appear pursuant to a final order of removal at the time and place ordered by the Service, you will not be eligible for voluntary departure, cancellation of removal and any change or adjustment of status for 10 years from the date you were scheduled to appear.

WILLIAM C. PETERSON
Immigration Judge

CERTIFICATE PAGE

I hereby certify that the attached proceeding before WILLIAM C. PETERSON, in the matter of:

MUHAMMAD TARIQ

A 78 565 762

Houston, Texas

was held as herein appears, and that this is the original transcript thereof for the file of the Executive Office for Immigration Review.

/s/ J.K. Buckley
J.K. Buckley (Transcriber)

Deposition Services, Inc.
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February 4, 2005
(Completion Date)

FILED
MAR 16 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-952

In the Supreme Court of the United States

MUHAMMAD TARIQ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether, in the absence of an approved labor certification application, an alien can establish prima facie eligibility for adjustment of status under 8 U.S.C. 1255(i) for purposes of seeking reopening of his removal proceedings.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 9

TABLE OF AUTHORITIES

Cases:

Ahmed v. *Gonzales*, 447 F.3d 433 (5th Cir. 2006) 3, 4, 5, 7, 9
Gutierrez-Lopez, In re, 21 I. & N. Dec. 479 (BIA 1996) ... 2
Khan v. *Attorney Gen. of the U.S.*, 448 F.3d 226 (3d Cir. 2006) 3, 7
INS v. *Abudu*, 485 U.S. 94 (1988) 2, 5, 6
INS v. *Doherty*, 502 U.S. 314 (1992) 8
Ordonez v. *INS*, 345 F.3d 777 (9th Cir. 2003) 2
S-V-, In re, 22 I. & N. Dec. 1306 (BIA 2000) 2
Sevoian v. *Ashcroft*, 290 F.3d 166 (3d Cir. 2002) 2, 8
Subhan v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004) 4, 8
Wisniewski v. *United States*, 353 U.S. 901 (1957) 9
Zafar v. *United States Att'y Gen.* 461 F.3d 1357 (11th Cir. 2006) 7

Statutes and Regulations:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* ... 1
8 U.S.C. 1229a(c)(6) 1

Statutes and regulations—Continued: Page

8 U.S.C. 1255(i) ..... *passim*
8 U.S.C. 1255(i)(1)(B)(ii) 3
8 U.S.C. 1255(i)(2) 7
8 U.S.C. 1255(i)(2)(A) 7
8 U.S.C. 1255(i)(2)(A)-(B) 3
8 C.F.R.:
Section 204.5(a) 3, 7
Section 1003.2(a) 6, 8
Section 1003.2(c) 8
Section 1003.2(c)(1) 2, 4, 6
Section 1245.2(a)(2) 3
Section 1245.10(a)(1)(i)(B) 3

In the Supreme Court of the United States

No. 06-952

MUHAMMAD TARIQ, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is not published in the *Federal Reporter*, but is reprinted in 202 Fed. Appx. 698. The decisions of the Board of Immigration Appeals (Pet. App. 4-5, 6-7) and the immigration judge (Pet. App. 8-17) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 13, 2006. The petition for a writ of certiorari was filed on January 9, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien "may file one motion to reopen [his removal] proceedings." 8 U.S.C.

1229a(c)(6). Under the regulations governing motions to reopen, a motion to reopen "shall state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits or other evidentiary material." 8 C.F.R. 1003.2(c)(1). In addition, a "motion to reopen proceedings for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation." *Ibid.* The "decision to grant or deny a motion to reopen * * * is within the discretion of the Board [of Immigration Appeals]." 8 C.F.R. 1003.2(a).

An alien seeking to reopen his removal proceedings to enable him to apply for new relief must establish prima facie eligibility for that relief. See *INS* v. *Abudu*, 485 U.S. 94, 104 (1988) (a motion to reopen may be denied if "the movant has not established a prima facie case for the underlying substantive relief sought"); *In re Gutierrez-Lopez*, 21 I. & N. Dec. 479, 482 (BIA 1996) (an alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted). Establishing a prima facie case of eligibility "requires the applicant to produce objective evidence showing a 'reasonable likelihood' that he can establish" that he is entitled to relief. *Sevoian* v. *Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citation omitted); accord *Ordonez* v. *INS*, 345 F.3d 777, 785 (9th Cir. 2003); *In re S-V-*, 22 I. & N. Dec. 1306, 1308 (BIA 2000) (en banc) (a prima facie case of eligibility must "reveal[] a reasonable likelihood that the * * * requirements for relief have been satisfied").

b. Under 8 U.S.C. 1255(i), certain aliens who otherwise would be ineligible to adjust their status to that of an alien lawfully admitted for permanent residence, including aliens who entered the United States without

inspection, may seek to adjust their status upon payment of a fee. Section 1255(i) applies to an alien who entered the United States without inspection if, *inter alia*, the alien is the beneficiary of an application for a labor certification filed on his behalf on or before April 30, 2001. 8 U.S.C. 1255(i)(1)(B)(ii); 8 C.F.R. 1245.10(a)(1)(i)(B). An applicant for adjustment of status under Section 1255(i) must also meet other statutory eligibility requirements, including that the alien be eligible to receive an immigrant visa and be admissible to the United States for permanent residence, and that an immigrant visa be immediately available to the alien at the time that the application is filed. 8 U.S.C. 1255(i)(2)(A)-(B).

Applying for adjustment of status under Section 1255(i) based on an employer's application for labor certification involves a "long and discretionary process." *Ahmed* v. *Gonzales*, 447 F.3d 433, 439 (5th Cir. 2006). The potential employer must first file an application for a labor certification and establish, *inter alia*, that there is no United States citizen available to fill the job. The filing of an application for a labor certification by an alien's prospective employer is "only the first preliminary step toward completing a § 1255(i)" adjustment-of-status application. *Id.* at 438. If the labor certification is approved, the prospective employer must then file the approved labor certificate along with an employment-based visa petition (Form I-140). See 8 C.F.R. 204.5(a). Finally, if the employment-based visa petition is approved, the alien's application for adjustment of status will be considered for adjudication. See 8 C.F.R. 1245.2(a)(2); *Khan* v. *Attorney Gen. of the U.S.*, 448 F.3d 226, 228 n.2 (3d Cir. 2006) (explaining the "three-step process" required for an alien to adjust status under

Section 1255(i) by means of an employment-based visa petition); *Ahmed*, 447 F.3d at 438 n.3 (same).

2. Petitioner is a native and citizen of Pakistan. Pet. App. 8. He entered the United States in 1998 as a nonimmigrant visitor and remained beyond his authorized stay. *Ibid.* In March 2003, the government initiated removal proceedings against petitioner. *Ibid.* On April 12, 2004, the immigration judge (IJ) found petitioner removable as charged. *Id.* at 8-9. The IJ also denied petitioner's application for withholding of removal, and ordered him removed from the United States. *Id.* at 16.

On July 14, 2005, the Board of Immigration Appeals (Board) affirmed the IJ's decision. Pet. App. 6-7. Petitioner then filed a petition for review with the court of appeals. See *id.* at 1-2.

3. While his petition for review was pending, petitioner filed a motion with the Board to reopen his removal proceedings. Pet. App. 4. He sought reopening to permit him to apply for adjustment of status based on a pending—but as yet unapproved—application for labor certification that had been filed on his behalf by a prospective employer. Petitioner relied on *Subhan* v. *Ashcroft*, 383 F.3d 591, 595 (7th Cir. 2004), which held that an IJ had abused his discretion by denying a continuance of removal proceedings where an application for labor certification had been filed on the alien's behalf.

On November 28, 2005, the Board denied petitioner's motion to reopen. Pet. App. 4-5. The Board noted that, pursuant to 8 C.F.R. 1003.2(c)(1), a motion to reopen for the purpose of seeking new relief (such as adjustment of status) "must be accompanied by the appropriate application and by all the supporting documentation." Pet. App. 4. The Board held that petitioner had failed to sat-

isfy that requirement because he had submitted no evidence showing that he was the beneficiary of an approved labor certification. *Ibid.* The Board explained that, "[i]n the absence of an approved labor certification, [petitioner] is unable to establish prima facie eligibility for [adjustment of status under Section 1255(i)] so as to warrant reopening." *Id.* at 4 (citing *Abudu*, 485 U.S. 94). The Board also held that *Subhan* was not binding precedent because petitioner's case did not arise in the Seventh Circuit. *Ibid.*

4. The court of appeals denied the petition for review in an unpublished, per curiam opinion. Pet. App. 1-3.[1] The court observed that a successful motion to reopen must establish a prima facie case of eligibility for the underlying relief sought. *Id.* at 2 (citing *Abudu*, 485 U.S. at 104). The court ruled that the Board did not abuse its discretion in finding that petitioner had failed to show his eligibility for adjustment of status under Section 1255(i). *Id.* at 3. The court explained that eligibility for adjustment of status under Section 1255(i) requires that (i) the alien be eligible to receive an immigrant visa and admissible to the United States for permanent residence; and (ii) an immigrant visa be immediately available to the alien at the time the application is filed. *Id.* at 2. Here, the court reasoned, the filing of a labor certification does not itself "vest an alien with any right to relief from removal but is merely one step in the 'long and discretionary process' of obtaining an adjustment of status under § 1255(i)." *Ibid.* (quoting *Ahmed*, 447 F.3d at 438-439).

---

[1] On appeal, petitioner abandoned his first petition for review and sought review only of the Board's denial of his motion to reopen. See Pet. App. 1-2.

ARGUMENT

Petitioner argues (Pet. 13-16) that the Board was required to reopen his removal proceedings in light of the pending labor certification application that had been filed on his behalf. That contention lacks merit and does not warrant review.

1. The court of appeals correctly held that the Board did not abuse its discretion by determining that petitioner failed to meet his burden of establishing prima facie eligibility for adjustment of status under Section 1255(i). Pet. App. 3. Pursuant to 8 C.F.R. 1003.2(c)(1), "[a] motion to reopen proceedings [before the Board] for the purpose of submitting an application for relief must be accompanied by the appropriate application for relief and all supporting documentation." Furthermore, to warrant reopening for that purpose, an alien must establish prima facie eligibility for that relief. See *INS* v. *Abudu*, 485 U.S. 94, 104 (1988) (holding that a motion to reopen may be denied if "the movant has not established a prima facie case for the underlying substantive relief sought"). Even then, the decision whether to grant or deny a motion to reopen is "within the discretion of the Board," and "[t]he Board has discretion to deny a motion to reopen even if the party moving has made out a *prima facie* case for relief." 8 C.F.R. 1003.2(a).

It is undisputed that petitioner did not submit any evidence in connection with his motion to reopen showing that he was the beneficiary of an approved labor certification. Citing *Abudu*, the Board correctly ruled that, "[i]n the absence of an approved labor certification, [petitioner] is unable to establish prima facie eligibility for [adjustment of status under 8 U.S.C. 1255(i)] so as to warrant reopening." Pet. App. 4-5.

Petitioner contends (Pet. 14-15) that he established prima facie eligibility for adjustment of status by providing proof of a pending labor certification application. That argument lacks merit. The court of appeals recognized that, under the terms of Section 1255(i)(2), the Attorney General "may adjust" the status of an alien applying under Section 1255(i) only if "(A) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence; and (B) an immigrant visa is immediately available to the alien at the time the application is filed." Pet. App. 2. At the time that he filed his motion to reopen with the Board, petitioner had no approved labor certification, his prospective employer had not filed an employment-based visa petition on his behalf, and he had no approved visa petition. See *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1363-1364 (11th Cir. 2006) ("The mere filing of a labor certificate application * * * does not make an alien *eligible* for adjustment of status under § 1255(i)."); *Ahmed* v. *Gonzales*, 447 F.3d 433, 438 (5th Cir. 2006) ("[N]othing in § 1255(i) vested any right to relief from removal when [the alien] filed his labor certification."). Indeed, without an approved labor certification, his potential employer could not file a visa petition on his behalf. 8 C.F.R. 204.5(a) (requiring that the Form I-140 be accompanied by an approved labor certification). Petitioner thus could not satisfy Section 1255(i)(2)(A)'s requirement that he be "eligible to receive an immigrant visa."

In short, without an approved visa petition in hand, petitioner could not demonstrate statutory eligibility for adjustment of status under Section 1255(i). See *Ahmed*, 447 F.3d at 438 n.3; *Khan v. Attorney Gen. of the U.S.*, 448 F.3d 226, 235 (3d Cir. 2006) (noting that an approved

immigrant visa "is a prerequisite to an adjustment of status under § 1255(i)"). Therefore, petitioner could not make out a case of prima facie eligibility, which "requires the applicant to produce objective evidence showing 'a reasonable likelihood' that he can establish" that he is entitled to relief. *Sevoian* v. *Ashcroft*, 290 F.3d 166, 175 (3d Cir. 2002) (citation omitted).

2. Contrary to petitioner's argument (Pet. 16-19), the court of appeals' unpublished decision does not conflict with the decision of any other court of appeals. No court, in the context of a motion to reopen before the Board, has held that an alien can establish prima facie eligibility for adjustment of status under Section 1255(i) by showing the mere *pendency* of a labor certification application.

Petitioner argues (Pet. 12-13, 16-17) that the decision below conflicts with *Subhan* v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004). *Subhan*, however, arose in the distinct context of a request for a continuance of a pending hearing before an IJ, not a motion to the Board to reopen a removal order that has become final. See *INS* v. *Doherty*, 502 U.S. 314, 323 (1992) (noting that the Attorney General has broad discretion to grant or deny motions to reopen, and that they are "disfavored" because "every delay works to the advantage of the deportable alien who wishes to remain in the United States."). Motions before the Board to reopen a final removal order are governed by distinct requirements not applicable to motions for a continuance before an IJ, see generally 8 C.F.R. 1003.2(a) & (c), including the requirement to establish prima facie eligibility for any form of newly requested relief. Petitioner did not satisfy that threshold requirement. *Subhan* necessarily did not address that requirement because it dealt with the separate issue of

an IJ's authority to grant or deny a request for a continuance in an ongoing proceeding.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[2] Insofar as petitioner suggests (Pet. 17-18) that the court of appeals' decision conflicts with prior decisions of that court, there is no occasion for this Court to review that suggested intra-circuit conflict. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam). In any event, petitioner errs in asserting an intra-circuit conflict. In both of the Fifth Circuit decisions he cites, as in this case, the court *sustained* the denial of the requested relief—either a request for a continuance or a motion to reopen. See Pet. 17-18.

Petitioner also errs in suggesting (Pet. 15-16) that the denial of his motion to reopen infringed his due process rights. The grant of a motion to reopen, and the grant of adjustment of status, are discretionary, such that their denial works no due process violation. See *Ahmed*, 447 F.3d at 440.